SOPHIE KALEAK (HEIR OF FRED HURLEY)

178 IBLA 217 Decided November 20, 2009

United States Department of the Interior
Office of Hearings and Appeals
Interior Board of Land Appeals
801 N. Quincy St., Suite 300
Arlington, VA 22203

SOPHIE KALEAK (HEIR OF FRED HURLEY)

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Appeal from a decision of the Alaska State Office, Bureau of Land Management, denying a request to add acreage to a Native allotment for which a certificate had been issued. AA-7767.

Affirmed.

1. Alaska: Native Allotments--Alaska National Interest Lands Conservation Act: Native Allotments

Where the legal descriptions of fractional parcels contained in a handwritten draft Native allotment application are identical to the legal description provided in the final typed application filed with BLM and for which an allotment certificate has been issued, a notation on the draft allotment application that it is for "± 160 acres" alone provides no factual or legal basis for reinstating the allotment application as a matter of law.

APPEARANCES: Carol Yeatman, Esq., Alaska Legal Services Corporation, Anchorage, Alaska, for appellant; Steven Scordino, Esq., Office of the Regional Solicitor, Alaska Region, U.S. Department of the Interior, Anchorage, Alaska, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE ROBERTS

Sophie Kaleak,[1] an Heir of Fred Hurley, has appealed from a March 2, 2009, decision of the Alaska State Office, Bureau of Land Management (BLM), denying the

[1] Following a probate hearing held by the Hearings Division, Office of Hearings and Appeals, U.S. Department of the Interior, on Nov. 14, 1995, Sophie Hurley Kaleak, Fred Hurley's daughter, was determined to be his sole heir. *See* Order Determining Heirs, Probate IP SL 218G 96.

"Request for Reinstatement of 35.03 Acres Previously Deducted from Allotment in Error" (Request for Reinstatement) filed by the Bristol Bay Native Association (BBNA) on behalf of Kaleak. For the reasons set forth below, we affirm BLM's decision.

BACKGROUND

Hurley applied for a Native allotment pursuant to the Native Allotment Act of May 17, 1906, 43 U.S.C. §§ 270-1 to 270-3 (1970).[2] The application filed with BLM described the land sought as consisting of two parcels, as follows:

> PARCEL A: Fractional W½SW¼SE¼, SE¼SW¼ Sec. 11; Fractional NE¼NW¼, Fractional N½SE¼NW¼ Sec. 14, T. 3 S., R. 42 W., SM [Seward Meridian]
>
> PARCEL B: Fractional SW¼SE¼ Sec. 11; Fractional NW¼NE¼ Sec. 14, T. 3 S., R. 42 W., SM.
>
> As shown on the attached portions of a copy of USGS Quadrangle Map Dillingham D-2 which becomes a part of this application.

The referenced map shows Parcel A on the west side of the Mulchatna River and Parcel B on the east side of the River. The application stated no acreage figure. A Bureau of Indian Affairs (BIA) Realty Specialist certified Hurley's application on April 11, 1972, and BLM received it on April 17, 1972.

BLM completed a field examination of Parcels A and B on August 8, 1974, and Hurley was present for the examination. The record contains no suggestion that he questioned the location or the parameters of the lands examined. The parcels examined correspond with the lands described in Hurley's application. Consistent with the map attached to Hurley's typewritten application filed with BLM, the sketch map attached to the BLM Field Report shows Parcels A and B as comprising a single square bisected by the Mulchatna River.

By letter dated March 4, 1976, BLM informed Hurley that his Parcels A and B required additional evidence of use and occupancy, and that the application was for an allotment of approximately 125 acres. With the letter, BLM provided Hurley with a copy of the Field Report. The return-receipt card shows that Hurley received these documents on March 9, 1976. On April 30, 1977, and May 11, 1977, BLM received witness statements corroborating Hurley's use and occupancy of the lands described

[2] The Act was repealed with a savings provision by section 18(a) of the Alaska Native Claims Settlement Act of December 18, 1971, 43 U.S.C. § 1617(a) (2006).

in the Field Report. One of the witness statements, that of William Hurley, included a hand-drawn map depicting two parcels, one on each side of the Mulchatna River.[3]

On May 9, 1990, BLM issued a notice of Conformance to Plat of Survey for Parcels A and B, stating that Parcel A contained 89.99 acres and that Parcel B contained 34.98 acres, aggregating 124.97 acres. A copy of the survey plat, U.S. Survey No. 8499 (which was officially filed on September 25, 1987), and Master Title Plat, were included with the notice. Hurley was given 60 days to notify BLM in writing if the lands did not include all the improvements intended to be on the parcels, or if the surveyed location was different from the intended location. Hurley or his representative received the notice on May 14, 2990, according to the return-receipt card.

On May 24, 1990, BLM received a survey acceptance form for each parcel signed by Hurley and submitted on his behalf by BBNA's Realty Specialist. The forms identically stated:

> I have carefully reviewed the survey of my Native Allotment parcel(s). This survey correctly represents my Native Allotment parcel(s). The location is correct, the configuration (shape) of the parcel(s) is/are correct, and the acreage is what I originally applied for.
>
> I accept the survey as being correct.

The bottom of both forms, which were left blank, provided:

> I do not accept this survey of my Native Allotment parcel(s) for the following reasons:
>
> _____ wrong location
> _____ wrong shape of parcel(s)
> _____ does not include all my improvements
> _____ improper acreage

On August 23, 1990, a Certificate of Allotment for Parcels A and B was issued to Hurley aggregating 124.97 acres.

[3] BLM notes that a minor conflict arose between Parcel A and another Native allotment application. The Apr. 30, 1984, conflict resolution submitted by BIA did not impact the description of Hurley's Parcel A. *See* BLM's Answer at 3.

On May 21, 2007, BLM received a request from BBNA on behalf of Kaleak requesting "reinstatement" of approximately 35 acres in Parcels A and B. BBNA attached part of Hurley's handwritten draft application found in the BIA file, marked as Exhibit A. In the legal description section, the draft application states: "See attached map." The attached map shows a single square around the Old Man Creek and the Mulchatna and Koktuli Rivers and a line to it with the notation, "approx. 160 acres." As noted by BLM, "[t]he attached map does not have a date or any other identifying mark to show when or who completed the map." Answer at 4.

On March 2, 2009, BLM issued the decision denying Kaleak's Request for Reinstatement, concluding that neither Hurley nor his Heir ever objected to the acres specified in the Field Reports, the description of Hurley's claimed lands as stated in the Conformance to Plat of Survey notice, the survey acceptance form, or to the total acreage for which a final Certificate of Allotment was issued on August 23, 1990. BLM held that Hurley's land patent is administratively final for the Department and cannot be re-adjudicated. In addition, BLM found that if it treated the Request for Reinstatement of additional acreage as an amendment, then the application was time-barred by section 905(c) of the Alaska National Interest Lands Conservation Act (ANILCA), 43 U.S.C. § 1634(c), citing *Heirs of Alice Byayuk*, 136 IBLA 132, 138-39 (1996).

ANALYSIS

Kaleak posits that the handwritten version of Hurley's allotment application, disclosed to BLM for the first time as an attachment to the Request for Reinstatement, clearly claims 160 acres. Kaleak asserts that in submitting Hurley's typed application, BIA "did not transfer the exact information Mr. Hurley included in his original application and thereby caused a 35.03 reduction to his allotment." Statement of Reasons (SOR) at 2. Kaleak points out that "the map attached to the typed application does not contain Mr. Hurley's name or the amount of acreage for his allotment as shown in the [sketch] map attached to his original application." *Id.* at 5. She also states that "the typed application contains remarks not found in the original hand-written application. Under the 'Remarks' section of the typed application, it states 'I use this land for my subsistence and livelihood in our traditional native way of life.'" *Id*. While not explicitly articulated, we presume Kaleak emphasizes the differences between the handwritten and the typed applications in an effort to show that Hurley completed his original application for 160 acres and that BIA unilaterally changed the application, thereby depriving Hurley of his intended Native allotment. We disagree; the record is plainly inconsistent with Kaleak's argument.

When BBNA attached Hurley's handwritten draft application to its Request for Reinstatement, it omitted a pertinent page therefrom. *See* Answer, Ex. 1. This page

is a typed form, which contains handwritten information, as evidenced by the script text. The form reads in relevant part:

> NAME: Fred Hurley
> PARCEL: A
> Frac. W2SW¼ SE¼, SE¼ SW¼; Sec. 11; Frac. NE¼ NW¼; Frac. N½ SE¼ NW¼; Sec. 14 T. 3S, R. 42 W, S M.
>
> Quadrangle or Protraction Sheet Dillingham D-2
> Excess Shoreline: Yes ✓ Combined
> No _____
>
> NAME: _____
> PARCEL: B
> Frac. SW¼ SE¼; section 11; Frac. NW¼ NE¼; Sec. 14; T. 3S, R. 42 W, S M.
>
> Quadrangle or Protraction Sheet Dillingham D-2
> Excess Shoreline: Yes ✓ Combined
> No _____

This legal description, attached to Hurley's handwritten draft application, is exactly the same description provided in the filed, typed application. Thus, Hurley's draft of the application, in fact, described two parcels – a description that was copied verbatim to the typed application. The assertion that BIA reduced Hurley's allotment by bifurcating one parcel into two parcels is obviously false.[4]

Kaleak's assertion that Hurley originally intended to, and applied for, 160 acres is wholly uncorroborated and is actually contradicted by the record. Except for the notation "approx. 160 acres" on the sketch map attached to the handwritten application, the land description in the typed application and the attached map BLM received and acted on is the same. Even assuming that the handwritten draft application represents what Hurley intended to file as his allotment application, as Kaleak argues, the fact remains that Hurley claimed use and occupancy of two parcels. As we have previously explained, the aggregate

[4] Even other Native witnesses averred that Hurley claimed two distinct parcels. On May 11, 1974, BLM received a witness statement, which supported Hurley's use and occupancy of "Parcel A" and "Parcel B."

acreage of parcels that are fractional in size due to the presence of a river or water body will always be less than 160 acres when surveyed. *See Heir of Ann A. Carney*, 176 IBLA 130, 141 (2008). By claiming lands intersected by water bodies, Hurley is necessarily charged with knowledge that his allotment would encompass less than 160 acres. *Id.; see Heirs of Okalena Wassillie*, 175 IBLA 355, 358-59 n.4 (2008).

As noted, Hurley attended the field examination on August 8, 1974, to help the Field Examiner determine the location of his claimed lands. The Field Reports prepared for Parcels A and B noted that "Fred Hurley, the applicant, identified the claimed lands which had been described correctly on the application." The Reports described the fractional parcels as consisting of ±90 acres and ±35 acres, respectively, and included a metes and bounds description. In a March 4, 1976, letter, which Hurley received March 9, 1976, BLM advised him, *inter alia*, that his "application is for two parcels totaling approximately 125 acres of unsurveyed lands in T. 3 S., R. 42 W., Seward Meridian." We have noted that after the land was surveyed, BLM issued a Conformance to Plat of Survey notice on May 9, 1990, for Hurley's allotment "[a]ggregating 124.97 acres." Hurley signed and dated the survey acceptance form on May 18, 1990, formally acknowledging that the survey accurately depicted the size, shape, and location of his parcel. BLM issued a Final Certificate of Allotment, which conveyed to Hurley 124.97 acres, described as "[l]ots 2 to 5, U.S. Survey No. 8499, Alaska, situated on the left and right banks of the Mulchatna River at its confluence with Old Man Creek." Additionally, nothing in the case file shows how Hurley's activities from the time he filled out his handwritten draft application to the time of his death in 1995 were consistent with his alleged intent to acquire 35.03 more acres of land than described and allotted to him.

This case is similar to *Heir of Ann A. Carney* and *Heirs of Okalena Wassillie*, where those applicants also sought fractional sections. As in those cases, Hurley never questioned the application or survey, and never asserted a claim for additional acreage elsewhere based on qualifying use and occupancy. Instead, he signed a survey acceptance form specifically stating that the surveyed parcels were correctly located and configured, and contained the acreage for which he had originally intended to apply.

Kaleak argues specifically that this case is governed by *Heirs of George Hoffman, Sr.*, 134 IBLA 361, 365-66 (1996), asserting that she is not trying to amend Hurley's application but is seeking consideration of the entire 160 acres requested by the handwritten draft version of his application. Aside from the fact that the complete handwritten version actually includes a property description exactly like what appears in the typewritten version filed with BLM, *Heirs of Okalena Wassillie*, 175 IBLA at 361, dictates rejection of Kaleak's argument. In that case, we found that unlike the applicants in *Heirs of George Hoffman, Sr.,* and *Matilda S.*

Johnson, 129 IBLA 82 (1994), Wassillie had received the lands she had used and occupied. We make the same ruling with regard to Hurley's application.

Since Kaleak has not established that Hurley originally intended to claim more land than he was conveyed, the Request for Reinstatement effectively becomes an untimely request by Kaleak to amend the application under section 905(c) of ANILCA, 43 U.S.C. § 1634(c) (2006). We have noted that BLM issued a notice conforming Parcels A and B to the surveyed description, that the survey was accepted, and that Hurley submitted his survey acceptance form acknowledging that the survey accurately depicted the size and location of the parcels. Under section 905(c) of ANILCA, no application may now be amended, for the reasons explained by the Board at length in *Heirs of Alice Byayuk*, 136 IBLA at 137-38. Kaleak's request to amend Hurley's Native allotment application is untimely and is therefore denied. *Id.; see also William M. Tennyson, Sr.*, 178 IBLA 138, 152 (2009); *Ann A. Carney*, 176 IBLA at 142-43; *Heirs of Okalena Wassillie*, 175 IBLA at 362*; United States v. Heirs of Harlan L. Mahle*, 171 IBLA 330, 390-91 (2007).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the decision appealed from is affirmed.

/s/
James F. Roberts
Administrative Judge

I concur:

/s/
Geoffrey Heath
Administrative Judge